

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

SAMUEL R. FLOYD, III, ET AL,)	
)	
Plaintiffs,)	November 17, 2020
)	
-versus-)	3:19-3304
)	
)	Charleston, SC
DELOITTE & TOUCHE LLP, ET AL,)	
)	
Defendants.)	

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE MARGARET B. SEYMOUR
SENIOR UNITED STATES DISTRICT JUDGE, presiding

A P P E A R A N C E S:

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Karen E. Martin, RMR, CRR
US District Court
District of South Carolina

1 Tuesday, November 17, 2020

2 (WHEREUPON, court was called to order at 2:09 p.m.)

3 THE COURT: Thank you. Good afternoon.

4 MS. POSNER: Good morning, Your Honor.

5 THE COURT: We are here in the matter of the
6 International Brotherhood of Electrical Workers vs.
7 Deloitte, et al. This is Civil Action No. 3:19-3304. And
8 we are here on the motion to dismiss that was filed by
9 defendants Deloitte.

10 At this time I'd like to ask who is here for the
11 plaintiff?

12 (Audio interference.)

13 THE COURT REPORTER: I -- somebody -- there's
14 feedback.

15 (Audio interference.)

16 MS. POSNER: Good morning, Your Honor. This is
17 Laura Posner, from Cohen, Milstein, Sellers, and Toll, on
18 behalf of the plaintiffs.

19 (Audio interference.)

20 THE COURT REPORTER: Excuse me. This is the
21 court reporter. Everybody needs to mute their background
22 unless they are speaking. Somebody has something going
23 on. I cannot understand anything.

24 THE COURT: All right. Everybody got that? For
25 the plaintiff, Laura Posner.

1 Who else?

2 MR. TINKLER: Your Honor, William Tinkler for
3 the plaintiff.

4 MR. TOLL: Your Honor, Steven Toll, also from
5 Cohen, Milstein, Sellers, and Toll for the plaintiff.

6 THE COURT: All right. Anyone else?

7 (There was no response.)

8 THE COURT: All right. For the defendant?

9 MR. OGIBA: This is Chris Ogiba from Moore and
10 Van Allen for the defendants.

11 MR. EDELMAN: Your Honor, Scott Edelman from
12 Milbank, for the defendants.

13 MS. MOSS: Your Honor, this is Meredith Moss,
14 associate counsel for Deloitte.

15 THE COURT: I'm sorry. I'm having a hard time
16 understanding you.

17 MS. MOSS: Let me try it again. This is
18 Meredith Moss and I'm associate general counsel from
19 Deloitte.

20 THE COURT: All right. Thank you.

21 Anyone else on the video conference?

22 (There was no response.)

23 THE COURT: All right. As I said, a motion to
24 dismiss was filed by Deloitte on July the 2nd. IBEW filed
25 a response in opposition on September the 18th. And then

1 there was a reply by Deloitte on October the 19th. So at
2 this time I'm going to hear from Deloitte on your motion
3 to dismiss.

4 **THE COURT REPORTER:** That's going to have to go
5 away.

6 **THE COURT:** Somebody -- there is a noise of some
7 sort. I don't know what it is. I hope everybody is
8 muted.

9 (Audio interference.)

10 **THE COURT:** We have an echo. Something's wrong.
11 Is everybody muted?

12 **MR. EDELMAN:** It's Mr. Edelman. Okay.

13 **THE COURT:** Okay.

14 **MR. EDELMAN:** Your Honor, may it please the
15 Court? Plaintiff's complaint contains extensive detail
16 about the alleged fraud perpetrated by SCANA and its
17 officers. In contrast, the allegations against Deloitte
18 are comparatively sparse. And similarly, in their
19 opposition brief, plaintiff's cited extensively to this
20 Court's decision on the motion to dismiss for the case
21 against SCANA. But, Your Honor, pleading a case against
22 SCANA is a very different matter than pleading a case
23 against SCANA's auditors. The standard for suing an
24 auditor for securities fraud is completely different than
25 the standard that applies in a case against SCANA and its

1 officers.

2 And Your Honor, there are many, many cases where
3 plaintiffs are permitted to proceed with securities fraud
4 claims against a company and its management, but those
5 same plaintiffs are barred from suing the company's
6 auditors. We cited a bunch of those cases in our brief.
7 We have a slide presentation, Your Honor, that we sent
8 over to you and the plaintiffs earlier. And I've got it
9 on a screen. I don't know if Your Honor has it or not?

10 **THE COURT:** I do have it. Thank you.

11 **MR. EDELMAN:** Okay. So, Your Honor, the first
12 substantive slide, I think it's just an example of
13 those -- of cases like that, including the Fourth
14 Circuit's decision in Public Employee's Retirement
15 Association of Colorado. There, there was a \$1.1 billion
16 settlement against a company and its insiders. And then
17 much like this case, there was a motion to dismiss made by
18 the auditors and it was dismissed and the Fourth Circuit
19 affirmed the dismissal. And we provided other examples
20 just to show that these are very different standards and
21 different cases.

22 Now, Your Honor, in this case, in the SCANA
23 class action, the one against the company that has been
24 settled, there was very experienced class counsel
25 appointed to represent the very same shareholders that

1 would be suing Deloitte here. That class counsel reviewed
2 all of the evidence and made a conscious decision to sue
3 SCANA and its officers and not to sue Deloitte.

4 The centerpiece of those plaintiffs' case had a
5 substantial focus of Your Honor's decision in that SCANA
6 case -- and I thought about bringing the transcript of
7 oral argument. And the central focus of the argument
8 transcript was plaintiffs' well-pleaded allegations
9 against SCANA and its officers that SCANA had received,
10 reviewed, and hidden from everybody the Bechtel Report in
11 order to perpetrate a securities fraud.

12 The theory that's being pursued here against
13 Deloitte on behalf of this purported class is completely
14 at odds with that theory. Now, here's an example of
15 what -- what the plaintiffs in the prior class action said
16 at oral argument when they were pursuing the case against
17 SCANA. They said that is a misleading statement when the
18 Bechtel Reports were sitting there, were sitting there now
19 at this point in time hidden in some lawyer's desk because
20 they had slapped an attorney/client privilege over it and
21 decided not to disclose it to anyone. But they knew it
22 was there and they knew that it should have been
23 disclosed.

24 So we have a case in -- a SCANA case where there
25 were well-pleaded allegations that SCANA and its officers

1 possessed this report. And then the plaintiffs went
2 further and they said they shrouded in attorney/client
3 privilege and they hid it from --

4 (Audio interference.)

5 Your Honor, as I will demonstrate in a few
6 minutes, the best inference to be drawn from the Deloitte
7 complaint is that Deloitte was on the outside of the SCANA
8 fraud, not on the inside of the SCANA fraud. And that's
9 why this complaint should be dismissed.

10 I'm going to focus mostly on the scienter
11 arguments in our briefs because we believe that is the
12 easiest and clearest path to dismissal. But before
13 getting to the scienter arguments, I want to start by
14 providing the Court with some context. Because, again,
15 with respect to the statements at issue themselves, this
16 case is very different than the case against SCANA.

17 So, first, the fraudulent statements alleged are
18 different. I'm going to show you in a little while that
19 in the SCANA class action, Your Honor attached an Exhibit
20 A to the decision that cataloged 99 different alleged
21 false statements. Because SCANA and its officers were on
22 a routine basis making representations about the schedule
23 for this project. In contrast, in this case, because it's
24 a Section 10(b) case and under Section 10(b) you can only
25 be sued for your own statements, not for somebody else's

1 statements.

2 The statements involving Deloitte are
3 essentially two. One, its audit opinion, which is an
4 opinion that they issued about SCANA's financial
5 statements saying that it had conducted an audit and
6 believed based on the audit that the financial statements
7 represented fairly in material respects SCANA's financial
8 position. And second, another opinion about whether SCANA
9 had effective internal controls over financial reporting.
10 So those are the statements at issue.

11 (Audio interference.)

12 The -- that takes us to, well, so they made a
13 statement where they said it's our opinion after our audit
14 that the financial statements are fair in all material
15 respects. The plaintiffs are alleging that the financial
16 statements had false statements in them. So the case
17 against Deloitte has to be, one, that there were false
18 statements in the financial statement -- not in the
19 statements to the PSC made by SCANA and not in the other
20 disclosures and a prospectus, not in all the other
21 statements that comprise the 99. They have to first
22 establish that they were closers to the financial
23 statement and then establish that Deloitte's statement
24 about its audit about those statements was false.

25 Now, if we look at the actual statements in the

1 financial statement that relate to the nuclear schedule
2 that is at the heart of plaintiff's pleading, they
3 basically boil down to three. And we have them on the
4 slide that has at the bottom right marked No. 5, Page 5
5 I'm going to call it. And the three statements were,
6 first, the financial statements summarized SCANA's new
7 agreements -- and I'm using the 2016 Form 10-K that was
8 issued in 2017 here as an example. They showed SCANA's
9 new agreements with its contractors. Well, those
10 agreements aren't in dispute. They were factual matters.
11 They show -- we're having a technical issue. Just a
12 moment. Our PowerPoint is not sharing. There we go. Can
13 everybody see it again?

14 **THE COURT:** Yes.

15 **MR. EDELMAN:** Okay. Thank you, Your Honor. My
16 apologies.

17 So second, there was disclosure about new
18 completion dates that had been established for the
19 project. Those were the completion dates, that was a
20 factual matter.

21 And then third, and this is the language that
22 the plaintiffs focus on most. There's language that said
23 in the financial statement, and this is what Deloitte was
24 auditing, based on current tax law and the contractual
25 guaranteed substantial completion dates and the recently

1 revised forecasted dates of completion. And we'll come
2 back to this, Your Honor, because this is a key point.
3 This schedule was constantly being moved back by the
4 defendants to reflect delays that everybody was aware of.
5 And it says based on those completion dates and tax law,
6 both new units would be operational and would qualify for
7 the nuclear production tax credits. But then it goes on
8 to say, however, any further delays in the schedule or
9 changes in tax law could adversely impact these
10 conclusions.

11 So just to be clear, these are the statements in
12 the financial statement that Deloitte was giving its audit
13 opinion about. And it's as to that that the plaintiffs
14 are alleging there was a fraud.

15 So this is a very different case than what we
16 had in SCANA. We pulled up some excerpts from the 99
17 statements that were attached to the motion to dismiss as
18 Exhibit A. And these are examples of statements made to
19 the PSC where they said the first plant is more than a
20 year ahead of schedule. The second plant is a little bit
21 less than six months ahead of that. There were specific
22 statements made by the company and its officers about when
23 they would complete the construction.

24 So again, very different in terms of what the
25 statements are at issue. The plaintiffs are trying to

1 portray the statement in the financial statement about
2 substantial completement as some sort of guarantee that
3 Deloitte was auditing and approving with respect to the
4 completion of the nuclear plants. But it clearly was not
5 a guarantee, it was just an assumption. And it was an
6 assumption that was being qualified that any further
7 delays could adversely impact that -- these conclusions.

8 And then -- and to provide further context, Your
9 Honor, about the lack of guarantee and how it would be
10 completely unfair to say that Deloitte was issuing an
11 audit opinion vouching for that these will definitely be
12 met, there was other disclosure in the 10-K where it was
13 specifically stated by SCANA that -- this is a quote from
14 the 10-K that we cited in our brief. There remains
15 substantial uncertainty as to Westinghouse's ability to
16 meet these dates given its historic inability to meet
17 forecasted productivity and work force efficiency levels.
18 So that's some context for what this case is about, what
19 the alleged misstatements are.

20 But at this point, as I forecast, I want to turn
21 to the scienter issue. Because, again, Deloitte believes
22 that's the easiest way for the Court to resolve this
23 motion. And we're going to in a few moments show that
24 there are no facts in this complaint to support any
25 inference that Deloitte possessed the Bechtel Report prior

1 to issuing its audit opinion.

2 The complaint makes clear that Deloitte was not
3 the party that was making allegedly false representations
4 to the regulators. The complaint makes clear that
5 Deloitte was being provided the same information by SCANA
6 that SCANA was providing to the regulators. And the
7 complaint makes clear that the information that SCANA
8 provided to those regulatory experts, what's convincing to
9 those regulatory experts, and it offers no reason why that
10 same information should not also have been convincing to
11 Deloitte. So I want to go now to the legal framework for
12 evaluating a claim of scienter in this case, which is
13 brought pursuant to the federal securities laws.

14 The PSLRA specifically requires -- it has a
15 heightened pleading standard for these types of cases,
16 because in 1995 congress wanted to make sure that only
17 cases with real merit with hard facts go into discovery.
18 And the PSLRA provides that the complaint shall with
19 respect to each act or omission alleged to violate this
20 chapter state with particularity facts giving rise to a
21 strong inference that the defendant acted with the
22 required state of mind.

23 Your Honor, the Supreme Court in the Tellabs
24 case, has had occasion to explain what that means. And
25 what it means, and we cite it here, is that the inference

1 of scienter has to be more than merely reasonable or
2 permissible. It has to be cogent and compelling.
3 Essentially, it's got to be at least as compelling as any
4 opposing inference one could draw from the facts that are
5 alleged.

6 Your Honor, in the Public Employees' case, the
7 Fourth Circuit case that I cited a little while ago, the
8 Fourth Circuit had the occasion to consider the standard
9 in the context of the case against an auditor. And it
10 explained that scienter can be shown by facts that show
11 intentional misconduct, which would mean that Deloitte
12 actually co -- conspired to participate in this fraud or
13 reckless conduct, conduct so highly unreasonable and such
14 an extreme departure from the standard of ordinary care as
15 to present a danger of misleading the plaintiff to the
16 extent that the danger was either known to the defendant
17 or so obvious that the defendant must have been aware of
18 it. And importantly, the Fourth Circuit made the point
19 that a showing of mere negligence is not sufficient. So
20 if plaintiffs allege facts, even if the facts were to show
21 that negligence was one of the most cogent explanations or
22 inferences to be drawn, this case has to get dismissed.

23 Tellabs and Public Employees' instruct the Court
24 to use its common sense when looking at allegations and to
25 ask the question, is one of the most compelling

1 explanations for what happened here that Deloitte was an
2 active participant or was so reckless that it conducted no
3 audit at all? And in the Fourth Circuit case the Fourth
4 Circuit actually endorsed the no audit at all standard
5 that had been adopted by Judge Sprizzo in the Southern
6 District of New York in an earlier case. The Fourth
7 Circuit said to be reckless you've got to show no audit at
8 all.

9 So here the complaint alleges -- and we would
10 submit that just if you pick up from a high level here,
11 the complaint alleges that SCANA and its officers were
12 engaged in a fraud on investors where they were trying to
13 hide the truth about the nuclear construction schedule.
14 It alleges that SCANA convinced the regulatory experts at
15 the PSC that the construction schedules were prudent when
16 SCANA knew them to be unachievable.

17 And one of the questions that has to be asked
18 under Tellabs is, accepting those facts, why would SCANA
19 and its officers provide information to Deloitte in the
20 course of an audit that would expose the fraud?

21 The SCANA plaintiffs allege that SCANA and the
22 insiders had a motive to commit fraud. They were getting
23 an extra half a billion dollars for repairs based on the
24 schedule that they were representing to be achievable.
25 What motive is offered for a national accounting firm like

1 Deloitte to go rogue and assist in a fraud about the
2 completion of construction of nuclear projects? None at
3 all. There are no payments or special benefits or other
4 evidence pleaded for Deloitte to go rogue and participate
5 in a fraud for reckless behavior to protect SCANA. And
6 there are no facts alleged for why SCANA would be sharing
7 the truth with Deloitte.

8 So, Your Honor, Deloitte vigorously contests any
9 claim that it did anything wrong at all. Deloitte was not
10 negligent. But, again, under Tellabs and Public
11 Employees, even if plaintiff put forth facts to show that
12 Deloitte might have been negligent, negligence is not
13 securities fraud. So if negligence -- and we don't think
14 you should find this. But if you think negligence is the
15 most cogent explanation based on the facts in this
16 complaint, this case has to be dismissed because
17 negligence is not enough.

18 Now, Your Honor, it's our position that this
19 case turns on the adequacy of the allegations with respect
20 to the Bechtel Report. And we have a couple of slides
21 that outline that argument. Because it -- the statute of
22 limitations argument and the scienter argument fit
23 together here to make this point. So if you look at the
24 slide that's labeled Page 10, it first makes the point
25 that under the federal securities laws, a claim of

1 securities fraud has to be brought not later than the
2 earlier of two years after the discovery of the facts
3 constituting of the violation, or five years. So what
4 that means here is that for plaintiffs to have a claim,
5 they need to both show evidence of scienter, allegations
6 of scienter, and they have to show that they didn't have
7 that information more than two years before they filed
8 their complaint.

9 Now, we showed in our moving brief, and
10 plaintiffs did not disagree in their answering brief,
11 although we have a demonstrative that suggests they make a
12 little different argument here today and I'll address
13 that. But in our moving brief we made the point that all
14 the scienter facts other than Deloitte's supposed
15 knowledge of the Bechtel Report were publicly available
16 more than two years before plaintiff filed their
17 complaint.

18 And if we turn to the next slide, in the
19 highlighted language on the right we have a quote from
20 their opposition. Plaintiffs said here, The statute of
21 limitations only began to run when Deloitte's knowledge of
22 the Bechtel Report, and therefore scienter, became
23 publicly known in October 2018.

24 So the plaintiffs are caught on the horns of a
25 dilemma and they solved it with this explanation in the

1 answering brief. If the facts that were known to the
2 class plaintiffs in the SCANA case were sufficient to sue
3 Deloitte, then plaintiffs were on notice of their claim
4 more than two years before. And that would mean the claim
5 has to be dismissed on statute of limitations grounds.

6 So they actually have to argue that the facts
7 that were in the SCANA complaint are insufficient to plead
8 a case against Deloitte. And the way they solve that in
9 their brief was with this sentence. Well, the statute of
10 limitations only began to run when Deloitte's knowledge of
11 the Bechtel Report, and therefore scienter, became
12 publicly known in October 2018.

13 So we focused our reply brief, and I was
14 prepared to focus here today, on the Bechtel allegations.
15 And I will show you that the Bechtel allegations are not
16 well pleaded allegations. That when you look just
17 underneath the surface of the bold claims, which we're
18 required to do on a motion to dismiss, that it's clear
19 that there is no support for the notion that Bechtel
20 had -- that Deloitte had a copy of that Bechtel Report
21 prior to issuing its audit opinions.

22 I'm going to -- after I go through the Bechtel
23 Report, I'm going to walk through the demonstrative that
24 defendants are planning to use with you because they are
25 now pointing to some other facts that the plaintiffs are

1 planning to use. They are now planning to point to some
2 other facts, and I'll walk through those facts as well.
3 But this was the position they took in their brief.

4 Before I get to the specifics on the Deloitte
5 report, I wanted to point out to Your Honor the Cozzarelli
6 v. Inspire Pharmaceuticals case from the Fourth Circuit,
7 2008. This is a case where plaintiffs made allegations
8 based on analyst reports. And the defendants went to the
9 analyst reports and they said, well, the analyst reports
10 are inconsistent with your allegations so the case has to
11 be dismissed. And the plaintiff said, well, you just have
12 to -- Court, you just have to listen to our allegations,
13 you shouldn't look at the underlying documents. And the
14 Fourth Circuit rejected that. The Fourth Circuit said in
15 the second sentence that they pulled out, rather, we must
16 examine the facts as a whole, including facts found in
17 documents incorporated into the complaint by reference.
18 So it's not enough for them just to say, well, Deloitte
19 had the Bechtel Report. They need to allege facts. And
20 we have to look at the facts and see if they support the
21 proposition. And here, Your Honor, they just don't.

22 So the centerpiece of their supposed allegation
23 that Deloitte was aware of the Bechtel Report was
24 testimony from a man named Jimmy Addison who was a
25 financial officer at SCANA and one of the defendants in

1 the prior case that was the subject of your motion to
2 dismiss.

3 And when you look at Mr. Addison's testimony,
4 what he said was that Deloitte had gone back with their
5 local team and their national team and reviewed all the
6 disclosures -- this is the key language -- at the point in
7 time that they were made and read the Bechtel Report and
8 they didn't see any gaps in the disclosure again at the
9 time they were made. This testimony, which they did cite,
10 was clearly on its face referring to an after-the-fact
11 review of the testimony to see if something needed to be
12 changed based on the new information, the Bechtel Report
13 that had been provided to Deloitte.

14 The second red block on the -- Page 97 of that
15 transcript he was asked, When did they tell you that? And
16 he said, I don't know specifically when, sometime,
17 obviously, post-abandonment. Further evidence that this
18 is testimony about something that happened after the audit
19 opinions at issue.

20 But, Your Honor, it gets even better for our
21 claim because it turns out that there was testimony that
22 they didn't cite in the complaint that makes it crystal
23 clear on page -- on Slide 15, I'm skipping ahead. It
24 makes it crystal clear that Mr. Addison was not saying
25 that Deloitte became aware of the results of the Bechtel

1 assessment back prior to issuing its audit opinion. He
2 was asked, Do you know where Deloitte -- when Deloitte
3 became aware of the results of the Bechtel assessment?
4 Answer, I do not know the answer to that.

5 They didn't cite that in their complaint. And
6 when we cited it in our answering brief, then when we
7 cited it in our moving papers they didn't respond to that
8 or even address it in the answering brief. So the Addison
9 testimony, the centerpiece of their allegation, it doesn't
10 support it at all. It actually suggests just the
11 contrary, that Deloitte went back and looked at it after
12 the fact. So that was the first prong of why they say
13 that there's an inference that Deloitte had this at the
14 time.

15 The second is something that we'll call the Swan
16 email. And the Swan email was an email, again, from a
17 financial officer within SCANA who wrote that he was the
18 controller at SCANA. And in September of 2015, he wrote
19 an email saying Deloitte may want to require disclosure of
20 the fact of the Bechtel engagement if Santee Cooper
21 decides to disclose it. And they cite this as evidence in
22 their complaint that, well, this shows that Deloitte had
23 the Bechtel Report.

24 Three problems with that logic, Your Honor.
25 First, this email is dated September 21st, 2015. Their

1 own allegations show that the Bechtel Report didn't even
2 exist until October 13, 2015, in its first draft. So
3 there's no way that this can be read, as they ask you to,
4 to say that this is proof that Deloitte had a copy of the
5 report.

6 The second problem with the allegation is this
7 email actually shows that Deloitte was doing its job. The
8 internal SCANA email discusses the possibility that
9 Deloitte might press SCANA to disclose the Bechtel
10 engagement. It certainly doesn't suggest in any way that
11 Deloitte is in on a fraud with SCANA.

12 The third problem is there's no allegation that
13 Santee Cooper ended up mentioning the Bechtel Report at
14 this point in time. So where he's saying, well, if Santee
15 Cooper mentions it, they may want us to mention it, too.
16 First of all, that was just speculation. But second, the
17 factual predicate that may cause them to want to disclose
18 it, there's no allegation it happened.

19 So, Your Honor, those are the two pieces of
20 evidence supporting a claim that Deloitte was given a copy
21 of the Bechtel Report. The Addison testimony, which
22 indicates just the opposite, and the Swan email, which
23 cannot possibly be read to say that Deloitte had a copy of
24 the report. Put simply, there's no evidence at all that
25 Deloitte had the Bechtel Report when it issued its

1 opinions.

2 So the fact that was the linchpin of the
3 plaintiff's arguments against SCANA and the officers, and
4 I would say the linchpin of Your Honor's decision denying
5 the motion to dismiss in that case, it just doesn't exist
6 in this case when you parse the evidence.

7 Now, Your Honor, the parties exchanged
8 demonstratives about -- about an hour before the argument.
9 And when we exchanged demonstratives, I've now -- I'm
10 going to show my technological -- I'm going to get
11 technological help actually. When we exchanged
12 demonstratives, plaintiffs provided us with a chart that
13 shows other facts that they learned within the two years
14 before the complaint was filed, which, Your Honor, I
15 firmly expect is going to be a retreat from that sentence
16 that we cited on Page 50.

17 Page 50 they said, you know, this is going to
18 rise and fall on when we knew about the scienter, when we
19 knew about the Bechtel Report. I think we did a very good
20 job in our reply brief of showing what I just walked
21 through.

22 And so now it appears that plaintiffs are going
23 to focus on some other facts to try to argue that scienter
24 was known with something that was after the two-year
25 period. And it falls -- it appears to fall into three

1 categories. So I'd like to respond to those now.

2 The first is the plaintiffs say that there
3 were -- they allege that Deloitte did something called
4 special audits and that the special audits are additional
5 evidence of scienter. And they said they didn't know
6 about the special audits until within the two-year period.

7 Do we have prints of --

8 So, Your Honor, I do think I have a slide that
9 is not in the packet that we provided to Your Honor
10 because we didn't expect to have to use this. But it's on
11 the monitor. And it's a -- this is the allegation from
12 their complaint that they make about the special audits.
13 And what they say about the special audits in the
14 complaint is that Deloitte was auditing the costs of the
15 nuclear project to make sure that they were all accurate
16 and properly charged to the nuclear project. And
17 plaintiffs then say, ah, well, if you were doing the
18 special audits, Deloitte, you would have seen there were
19 cost overruns and schedule delays and that's our evidence
20 of scienter.

21 The problem with this argument is that everybody
22 knew there were cost overruns and schedule delays. In
23 fact, Your Honor, by the second 10-K that we audited, not
24 only did everybody know there were cost overruns and
25 schedule delays, everybody knew that the schedule for

1 construction had been delayed twice, not once but twice,
2 with the PSC's approval because of cost overruns and
3 schedule delays. First, the company disclosed in
4 September 2015 that the June 2019 and June 2020 completion
5 schedule needed an 18-month contingency. Then in
6 October 2015, the company pushed back the schedule. And
7 then in the 2017 10-K, the company pushed the completion
8 back dates -- dates back to April 2020 and December 2020.

9 So for them to say, well, you did a special
10 audit to make sure the costs of this nuclear project were
11 accurately spent and accurately allocated. And while you
12 were doing that you saw there were delays and you saw
13 there were cost overruns. That's evidence that, hey, you
14 were in on the fraud. That doesn't make any sense because
15 everybody knew that. And everybody knew there were
16 absolutely delays in the schedule. So that's the first
17 prong of their additional efforts.

18 The second argument that they make is that there
19 were regulatory concerns regarding SCANA's ability to
20 complete the nuclear project in time. One, they go back
21 to that Swan email, which is dated in September of 2015.
22 And another is a letter from the regulators sent to SCANA
23 on June 30, 2016. And they say, well, we didn't know
24 about these two particular documents until we got within
25 the two-year period. So, aha, these are now going to be

1 our evidence of scienter, and they're within the two
2 years.

3 But the problem with this is, first, Your Honor,
4 these regulatory-concerned facts were all over the prior
5 complaint. They knew all sorts of facts just like this
6 more than two years before.

7 The second problem is the fact that the
8 regulators had a regulatory concern on June 30, 2016.
9 That doesn't show scienter for Deloitte because in
10 November of 2016 the PSC approved a revised schedule.
11 It's -- this is alleged in Paragraph 157 of their
12 complaint that the PSC approved a revised schedule and
13 found that any delay did not result from any imprudency.
14 So they're saying, well, Deloitte, you knew about a
15 concern that was expressed in June 2016, and that shows
16 you were in on the fraud. But they leave out the fact
17 that the issue that was raised by the regulators was
18 satisfactorily resolved by five months later and Deloitte
19 knew that, too.

20 So one, these aren't new facts. They don't get
21 around the statute of limitations. And two, they don't
22 show scienter.

23 And the third set of allegations is -- the
24 plaintiffs refer to allegations that they made at
25 Paragraphs 422 to 427 of their complaint about a

1 particular employee named -- they say Charlotte, Charlotte
2 Walker in the demonstrative, but I think they mean
3 Carlette Walker. And Carlette Walker had -- at one point
4 they allege had left a voice mail for Santee Cooper in
5 which she made allegations about the project. And they
6 say in their allegations, Deloitte should have spoken to
7 Santee Cooper -- not to Santee Cooper, I'm sorry, to
8 Carlette Walker.

9 Well, first of all, you hear that. They're
10 basically alleging negligence. Second off, they don't
11 allege -- they don't have any facts to say that Deloitte
12 didn't talk to Carlette Walker. What you would expect if
13 plaintiffs are alleging on a confidential informant in a
14 case like this to establish that this person was telling
15 Deloitte that there was all this bad stuff, that there was
16 a fraud. What's common in these cases is for plaintiff to
17 allege to go out to speak to the person and allege facts
18 that that person actually communicated something to
19 Deloitte. That's not what happened here.

20 All they've said is Ms. Walker made some bad
21 comments to somebody else and Deloitte should have spoken
22 to her. They don't allege that they know if we did speak
23 to her. And they also leave out the point that we made in
24 our reply brief that Ms. Walker in 2015 had testified
25 before the PSC. And we went at this on Page 11, Note 4 of

1 our reply brief and we cite to that publicly available
2 testimony. Ms. Walker had said that she was comfortable,
3 although there were delays, they were being dealt with.

4 And the last point here is, and they actually I
5 think are going to show you a footnote -- an email about
6 Ms. Walker, which I'm trying to pull up. Okay. My
7 technological ability is getting ahead of me, Your Honor.
8 But there's an email that they're going to show you where
9 somebody at Deloitte was talking about Carlette. And
10 Mr. Addison said to the Deloitte audit partner about
11 Carlette, Carlette is out. This is about somebody else.
12 She is aware Carlette is out and also aware of her general
13 disagreement. So they say, well, the board knew that
14 Carlette generally disagreed about something, and
15 therefore they should have spoken to her. And if they had
16 spoken to her, she would have disclosed everything about
17 the fraud.

18 Your Honor, this is total speculation. There's
19 no evidence that we didn't speak to Carlette. There's no
20 evidence of what Carlette would have said. And they also
21 leave out that even if Carlette had said I think the
22 schedule is going to be -- need to be delayed further, it
23 was delayed further. The company went to the PSC after
24 the date of this email and significantly moved the
25 schedule back. So even if Ms. Walker was disagreeing with

1 the schedule they had in place at the time, we know from
2 what happened that the schedule was moved back.

3 Your Honor, so for all those reasons I've tried
4 to address the arguments that were made in the brief.
5 I've tried to address the arguments that I suspect from
6 the demonstrative, the new arguments that are going to be
7 made.

8 This is not a case where there are facts that
9 establish a level of scienter against Deloitte. That
10 would require -- that would require that they show facts
11 that Deloitte had gone rogue or done no audit at all. And
12 that just -- that's completely contrary to the allegations
13 of this complaint. I mean, even this email shows Deloitte
14 was talking to people. And they themselves allege that
15 there were special audits of the costs. So there's no
16 allegation. And the best inference is that SCANA and its
17 officers would have wanted to keep that attorney/client
18 privilege around that Bechtel Report and keep it away from
19 Deloitte, not let them in on the alleged fraud that they
20 were committing.

21 Your Honor, there's one other area, with your
22 indulgence, that I'd like to raise. And I want to say
23 we -- we think with great conviction that this case should
24 be dismissed in its entirety on the basis of the scienter
25 issues. So I'm now going to move to another area, and I

1 don't want in any way to detract from the fact that we
2 think this case should be dismissed.

3 But if we turn out to be wrong, and we would
4 respectfully disagree, Your Honor, but if we turn out to
5 be wrong, there is a major loss causation issue that we
6 would like to address. And that is that, again, in
7 evaluating the loss causation allegations in this
8 complaint, one has to keep in mind what the claims against
9 Deloitte are as opposed to the claims that were asserted
10 against SCANA. Because as I've shown, the only claim
11 against Deloitte relates to its audit opinion about a
12 financial statement that talks about the schedule for
13 completion and whether the projects will get done by that
14 agreed schedule. That's the only real actionable
15 statement.

16 So we think we've demonstrated there's no basis
17 for a claim on that issue. But even if a claim were to go
18 forward, plaintiffs should only be able to sue Deloitte
19 for losses that investors incurred when the truth about
20 the construction schedule became known to investors. And
21 what I mean by that, Your Honor, is if they are saying,
22 well, Deloitte, you made a false statement about the
23 construction schedule, and you were in on that fraud, and
24 that statement gets corrected, then any losses that
25 happen, any further declines in the stock price after the

1 date it gets corrected are not recoverable. And here,
2 plaintiffs themselves -- I'm on Slide 17 now of our slide
3 deck. Plaintiffs themselves allege that on July 27th,
4 2017, it was disclosed to the market that that schedule
5 would not be met and it would not be able to get the tax
6 credits.

7 So as of July 27, 2017, the statement that
8 they're alleging falsity as to Deloitte had been correct.
9 But plaintiff's complaint ignores the differences between
10 the complaint against Deloitte as compared to the
11 complaint against SCANA.

12 And as you'll see from the next slide, they
13 allege that all sorts of additional bad news that came out
14 from SCANA after it was already known that the
15 construction schedule wouldn't be met, there was bad news
16 on August 2, August 4, August 9, August 10, September 7th,
17 all the way up to December 31 and the stock price kept
18 coming down and down and down and down. Well, those are
19 not declines that can possibly be alleged to have been
20 caused by the statement that they are suing Deloitte for.

21 We cite to an example of a case from the Fourth
22 Circuit, the Penn National Gaming case. Corrective
23 disclosures -- this is on Slide 19 -- must prevent --
24 present facts to the market that are new; that is,
25 publicly revealed for the first time, because if investors

1 already know the truth, false statements won't affect the
2 price. So -- and we cite a bunch of other cases for that
3 proposition in our brief.

4 So, Your Honor, again, we feel very strongly
5 that this case should not proceed against Deloitte, that
6 this is precisely the type of case that the public -- that
7 the PSLRA was enacted to avoid based on the heightened
8 scienter standard. However, if the case did proceed, Your
9 Honor, all of the stock price declines after July 27th,
10 2017, should be out of the case.

11 And with that, Your Honor, I have nothing
12 further. But I'd be happy to take questions from Your
13 Honor.

14 **THE COURT:** Okay. I just have a few questions.
15 One of the allegations that IBEW makes is that Deloitte
16 was required to obtain sufficient understanding of SCANA,
17 its environment and its internal controls over financial
18 reporting, including the relevant industry, the regulatory
19 and other external factors affecting SCANA, the nature of
20 the company, including its structure, and the company's
21 objectives and strategies. Would you agree with that?

22 **MR. EDELMAN:** Your Honor, if -- I can't say I
23 agree with every word. But, broadly speaking, an auditor
24 does have responsibility to familiarize themselves with
25 the business that they're auditing. And we absolutely are

1 very confident that Deloitte discharged its
2 responsibilities in that regard.

3 **THE COURT:** So IBEW is alleging that the audits
4 were not conducted in accordance with the applicable
5 standards and basically amounted to no audit at all.
6 Specifically, what does Deloitte -- what kind of inquiry
7 does Deloitte make, and what do you look at when you do
8 this type of audit?

9 **MR. EDELMAN:** Well, Your Honor, we're not
10 permitted on the motion to dismiss to put factual matters
11 before you. But I can tell you that Deloitte was very
12 familiar with the business here, that Deloitte reviewed --
13 I mean, they themselves allege that Deloitte reviewed the
14 costs that were at issue. Deloitte was familiar with what
15 was going on in the regulatory process. And Deloitte was
16 fully aware that the regulators, after taking extensive
17 testimony from officers at the company, had made a
18 prudency determination and had approved the schedules that
19 had been set. Deloitte was also aware in this case that
20 the company had renegotiated its contracts with the
21 contractor to provide a revised timetable and get an
22 agreement from the contractor that it would be done on a
23 fixed-cost basis.

24 So, I mean, here is -- this is not even remotely
25 a case, when you look at all the allegations where one can

1 say no audit at all. This is a case where Deloitte was
2 fully familiar, based on the complaint's allegations, with
3 the regulatory process, with the business of SCANA, and
4 knew all of that information.

5 And this -- I would submit, Your Honor, this is
6 a case where plaintiffs are just making boilerplate
7 allegations, which are negligence allegations. They're
8 saying you had an obligation to follow generally accepted
9 accounting standards. Yes, we did. You had a
10 responsibility to conduct an audit in the way an auditor
11 should conduct an audit. But there are not allegations
12 that -- facts that Deloitte didn't do it that way. But
13 even if there were, all that would get you to, all that
14 would get you to is a negligence standard. And negligence
15 is not enough.

16 **THE COURT:** All right. For example, IBEW
17 contends that Deloitte had a legal obligation to be
18 cognizant of what was happening at SCANA. For example,
19 when SCANA elected the fixed-price option, it created the
20 expectation that Westinghouse would be willing and able to
21 pay any costs that exceeded the 7.7 billion fixed price.
22 IBEW's alleging that SCANA and Deloitte knew, or should
23 have known, that the costs would exceed -- well, vastly
24 exceed the fixed price and Westinghouse would be unable to
25 fund excess costs.

1 So, basically, what they're saying is that the
2 audits were not conducted in accordance with applicable
3 standards and amounts to basically no audit at all when
4 they were given a clean audit report.

5 **MR. EDELMAN:** Your Honor, I understand that's
6 what they're saying. But what they're not doing is
7 they're not coming forward with facts. They have an
8 obligation to come forward with facts that show that
9 Deloitte -- and remember, you've got the regulators who
10 have thoroughly investigated this matter, who had
11 concerns, who got comfortable with their concerns and
12 issued prudency determinations and approved a revised
13 schedule.

14 And they're saying, without any facts, they're
15 saying, well, Deloitte should have known, which is a
16 negligence allegation, that Westinghouse wouldn't be able
17 to do this because it was going to cost a lot more. I
18 mean, first of all, that's very counterintuitive.
19 Westinghouse was a big company. And why Westinghouse
20 would agree to do something at a fixed price that it
21 thought it couldn't do makes no sense. But there are no,
22 there are no specific allegations.

23 The centerpiece of their complaint and their
24 answering brief was they said, hey, you had a copy of the
25 Bechtel Report. But what the allegations actually show is

1 that the Bechtel Report was not known to Deloitte. And in
2 fact, that Deloitte had every incentive to hide it -- that
3 Bechtel -- SCANA had every incentive to hide that Bechtel
4 Report from Deloitte.

5 **THE COURT:** Okay. One of the arguments you made
6 had to do with motive. And that there was a failure to
7 plead motive and so therefore there was a lack of
8 scienter. One of the things that IBEW's alleging is that
9 Deloitte has had a long or prolonged relationship with
10 SCANA and was paid nearly \$10 million for its audit work,
11 and a lot of the people that are working in the corporate
12 offices of SCANA were former Deloitte employees. Could
13 you address that?

14 **MR. EDELMAN:** Yes, Your Honor. You know, one of
15 the things -- one of the things that I did yesterday was I
16 reviewed some of the cases that they cite where complaints
17 have been able to stand against auditors. And, you know,
18 like the case -- like the MicroStrategy case that they
19 relied on, in a case like that there were allegations that
20 the independence requirement of the auditor had been
21 violated. I have seen no case, Your Honor, where merely
22 being an auditor for a company for, you know, some period
23 of years and collecting standard audit fees is motive
24 sufficient under the PSLRA to allege that the auditor is
25 engaged in fraud.

1 If that were the case, then any auditor, and
2 there are lots of them, who serves continuously for a
3 client for a large number of years, you can add up their
4 audit fees and you can say, oh, they have a motive to
5 commit fraud. The cases they rely upon, like the
6 MicroStrategy case or the New Mexico state case, there are
7 cases -- like the New Mexico state case, there's a billion
8 dollars in option awards that had no documentation. The
9 auditor in that case knew that the compensation committee
10 had -- had approved documents when they had no quorum and
11 they let it go.

12 The MicroStrategy case they specifically talked
13 about, there was the -- a violation of the independence
14 requirement. The cases do not treat mere long -- length
15 of audit relationship as being the type of facts that give
16 rise to a strong inference of fraud.

17 **THE COURT:** Okay. Thank you very much. I
18 appreciate that.

19 At this time I'll hear from counsel for
20 plaintiff.

21 **MS. POSNER:** Good afternoon, Your Honor. Before
22 I address defendant's specific arguments, I think it's
23 important to address what is not in contention at this
24 stage of the litigation. It's our position that the
25 things that Deloitte has conceded in its brief and again

1 here today are sufficient in and of themselves to survive
2 the motion to dismiss.

3 With regard to scienter, Deloitte does not
4 dispute that it failed to comply with PCAOB standards in
5 conducting its audits. It also doesn't dispute that
6 pursuant to PCAOB standards it was required to review the
7 category of documents that plaintiffs allege in the
8 complaint made clear that SCANA's financial statements
9 were not in accordance with GAAP and they would not be
10 able to meet the deadline for obtaining the nuclear tax
11 credits. They don't dispute that the challenged portions
12 of Deloitte's SCANA audits did not involve complex
13 accounting. They don't dispute that five months before it
14 issued its first clean audit report on SCANA's financial
15 statements as alleged in the complaint that they knew that
16 SCANA had engaged Bechtel, the pre-eminent authority in
17 the space of nuclear power plant construction, that
18 Bechtel was paid a million dollars for its assessment,
19 that Bechtel's work was so material to the company that
20 the company might need to disclose in its SEC filings that
21 it had hired Bechtel -- not even just the report but that
22 it had hired them. And that the company did not want to
23 disclose the Bechtel engagement to investors.

24 Then, Your Honor, in the first SCANA case, the
25 class action that my counsel -- my opposing counsel was

1 discussing with you earlier, you held that knowledge of
2 the Bechtel engagement, in and of itself, not the report
3 was sufficient to allege defendant's scienter. The same
4 is true here.

5 Deloitte also doesn't address, and therefore
6 concedes including today during their oral argument, most
7 of the facts that plaintiffs plead which help to establish
8 defendant's scienter. Instead, what they argued today and
9 in their briefs was that all of those facts are irrelevant
10 because on their own they were insufficient to establish
11 Deloitte's scienter. But that doesn't mean that they're
12 irrelevant to Deloitte's scienter. The opposite is
13 actually true.

14 I -- counsel put up the decision from the
15 Supreme Court in Tellabs. And as we know from the Supreme
16 Court's decision in Tellabs, the Court is obligated to
17 assess all of plaintiff's allegations holistically and
18 together, including those allegations that on their own
19 may not be sufficient to determine whether scienter is
20 sufficiently alleged.

21 And regardless, while Deloitte only focuses
22 primarily on the Bechtel Report, plaintiff pleads numerous
23 facts that only came to light within the two years prior
24 to the filing of the complaint that bears directly on its
25 scienter. And counsel showed our first slide, so let me

1 see if I can share that. I'm having trouble sharing here.
2 But if you have Exhibit 1 in front of you, Your Honor.

3 THE COURT: Whose Exhibit? Defendant's or
4 Plaintiff's?

5 MS. POSNER: Plaintiff's please.

6 THE COURT: Okay.

7 MS. POSNER: Okay. So this is a series of
8 pieces of information that did not come out publicly until
9 two years prior to the filing of the complaint. So even
10 if you were to ignore all of the dozens of pieces of
11 information that Deloitte should have reviewed that are
12 alleged in the complaint prior to the Bechtel Report
13 coming out, which would be inappropriate under Tellabs,
14 there is more than sufficient evidence that was disclosed
15 within the two years prior to the filing of the complaint
16 to establish Deloitte's scienter.

17 In addition to the Bechtel engagement and the
18 Bechtel Report, we learned about the fact that Deloitte
19 had already also been hired to conduct these special
20 audits of the costs associated with the nuclear power
21 plant construction and that they learned through those
22 special audits that the project was significantly behind
23 both in terms of its schedule but also there was very
24 overt costs.

25 And counsel said that what that really meant

1 was, well, everyone knew that they were behind schedule
2 and that they were over cost. And yes, that is true to a
3 certain extent. What people didn't know, including the
4 regulators because it was hidden from them, was that the
5 costs were so in excess of budget and that the timeline
6 was so behind schedule that they would not be able to meet
7 the deadline for obtaining the nuclear tax credits.

8 In addition to that, we learned that there were
9 a number of pieces of regulatory correspondence to SCANA
10 where they specifically raised issues about the company's
11 ability to meet the deadline. And while it is, of course,
12 true, that they ultimately did approve one scheduled
13 extension after this information came to light, Deloitte
14 has an obligation to confirm what the -- confirm the
15 information that is being provided to regulators, and
16 therefore to investors, and ensure that it is accurate.
17 It can't just take the word of what management says to
18 regulators. It has an obligation to express skepticism.
19 And it is abundantly clear from the internal documents
20 that they would not be able to meet that schedule, even
21 the extended schedule.

22 **THE COURT:** Let me ask you a quick question.

23 **MS. POSNER:** Please.

24 **THE COURT:** Why is it important that they be
25 able to meet the -- why is that significant that they be

1 able to meet the tax credit deadline, when I think
2 Deloitte argues that that cost was going to be passed on
3 to the consumer?

4 MS. POSNER: Yeah, honestly that was a bit of a
5 baffling point from defendant's briefs. It's clear, not
6 only from Your Honor's order in SCANA 1 but also from the
7 way revenue was recognized at this company, that obtaining
8 the tax credits and the ability to obtain the tax credits
9 was absolutely essential to investors. If they were going
10 to not meet that deadline, the ORS and PSC were not going
11 to approve additional cost increases under the PSLRA. And
12 if they didn't obtain those cost increases or rate
13 increases, they would have no revenue. So these were
14 absolutely critical to the company. The market understood
15 that. Analysts discussed regularly whether the company
16 was going to be able to obtain the nuclear tax credits.
17 They knew that the company had, quote, bet the family farm
18 on obtaining those tax credits. And if they weren't going
19 to be able to obtain them, this company was going to go
20 bankrupt.

21 In addition to the regulatory concerns that we
22 have since learned about, we also learned about Carlette
23 Walker's claim that SCANA was committing fraud. And we
24 didn't address this in our opposing brief because
25 defendants didn't raise it in their motion to dismiss.

1 But in their reply, they claimed that they didn't know
2 anything about what Carlette was complaining about.

3 And if you take a look at Exhibit 3, you see an
4 email chain, this is from February of 2016. And we know
5 from Carlette's testimony and other information that she
6 left the voice mail alleging that SCANA was committing
7 fraud sometime in the first half of 2016. This email is
8 sent in February of 2016. It starts with an email from
9 Eileen Little who is the audit engagement partner for
10 Deloitte at the time, and she's writing to Jimmy Addison,
11 the CFO. And she is asking Jimmy if this woman that she's
12 meeting with, a third party, is in aware -- in the loop on
13 the NND matters, NND meaning the new nuclear development
14 project, or the nuclear project. And Jimmy responds to
15 her that this woman is aware that Carlette is out and is
16 also aware of her general disagreement with the company.
17 And what he doesn't know is if she's been fully briefed by
18 Kevin -- and I assume that's Kevin Marsh.

19 So Eileen doesn't ask, oh, what are you talking
20 about? What is the general disagreement? What do I --
21 what it means to be briefed by Kevin Marsh. She clearly
22 knows from this email that Carlette has real problems with
23 the company and has disagreements and is out as a result
24 of it but does nothing to disclose to investors that one
25 of the primary people overseeing this project thought

1 there were major issues with their project.

2 So in addition so these facts, defendants also
3 don't challenge materiality. They concede materiality.

4 With regard to loss causation, they concede that
5 the alleged disclosures provided relevant information
6 regarding the nuclear project fraud or its concealed risks
7 and that SCANA stock rates dropped in response to each of
8 this -- these disclosures. Again, this is unsurprising
9 due to that this Court held that the very same disclosures
10 were material (indiscernible) risk hidden by SCANA's false
11 and misleading statements regarding the timeline for
12 obtaining the nuclear project credits in SCANA 1. These
13 concessions alone, in my opinion, are sufficient to
14 survive the motion to dismiss.

15 But there is significantly more alleged here
16 that is in contention. My counsel -- opposing counsel
17 discussed with you the standard for holding an auditor
18 liable. It is certainly the case that it is a tough
19 standard, which is why until it became clear that the
20 Bechtel Report had been obtained by Deloitte that they
21 were not sued. And that, again, doesn't mean that
22 information that they had available to them prior to that
23 is irrelevant to their scienter, but that until that piece
24 of information was known, it was unlikely to survive a
25 motion to dismiss. And under the Supreme Court's decision

1 in Merck, that is sufficient to prevent the beginning of
2 the statute of limitations.

3 With regard to the standard for proving scienter
4 against an auditor, Courts both in this circuit and
5 throughout the country, including in the cases cited by
6 Deloitte in its papers, uniformly hold that red flags
7 coupled with GAAS and PCAOB violations are sufficient to
8 plead scienter against an auditor. When they say no audit
9 at all, they don't literally mean you didn't do a single
10 thing. It's essentially you stuck your head in the sand
11 and didn't do your job as required under accounting
12 standards.

13 Now, you asked this question of opposing
14 counsel. And I think they say it even in their brief.
15 Auditors are required to obtain sufficient audit evidence
16 that is persuasive and provides a reasonable basis for a
17 high level of assurance that the financial statements are
18 materially correct. To do that they have to exercise due
19 professional care. They have to exercise professional
20 skepticism. They have to perform risk assessment
21 procedures that are sufficient to provide a reasonable
22 basis for identifying and assessing the risks of material
23 misstatements in the financial statements.

24 And to comply with those standards, Deloitte --
25 even if it admits in the context of its own very similar

1 audit of the Southern company, a very similar company to
2 SCANA, and in fact doesn't even dispute in the papers
3 here, it was required under those standards to request, to
4 obtain, and to review dozens of internal documents and
5 metrics bearing on the status of the nuclear project.

6 In addition to the information it learned as a
7 result of its own special audits, these internal documents
8 and metrics uniformly and on their face made clear that
9 SCANA's financial statements were not in accordance with
10 GAAP, and that the nuclear project would not be completed
11 in time to obtain the nuclear tax credits.

12 Although I'm going to discuss them a little bit
13 in more detail, these include at least half a dozen board
14 minutes that exclusively state that they're not going to
15 meet the deadline. It includes at least three risk
16 committee minutes where they identify the fact that
17 they're not going to meet the deadline as a, quote, key
18 risk, and they rate it as red. Not sure how much more of
19 a red flag you can have than something that's actually
20 quoted as a red risk.

21 We've had the Bechtel engagement. We have two
22 Bechtel Reports and a presentation. We have two reports
23 from CORB and an executive debrief and a presentation from
24 CORB. We have the regulatory correspondence that we
25 discussed already. We have dozens and dozens and dozens

1 of performance metrics that uniformly show that they are
2 not going to be able to meet the deadline. We have Santee
3 Cooper personnel and internal SCANA personnel stating
4 regularly that they are not going to meet the deadline.

5 They have -- we have the public disclosures from
6 Toshiba writing down and saying they are going to have to
7 repair because of issues with this project and what that
8 meant for the company in terms of its inability to
9 complete the project. And then we have the public
10 disclosure of the fact that this company continually has
11 to go ask for extensions and rate hikes.

12 These red flags are significantly
13 (indiscernible) in number and significance than those
14 typically found to be sufficient to demonstrate an
15 auditor's scienter, including by courts within this
16 circuit, such as in MicroStrategy.

17 And to be clear, failure to consider these
18 documents is not mere negligence, it is the epitome of
19 recklessness. It is purposefully sticking your head in
20 the sand and ignoring every flashing red light around you.
21 That is what is meant by no audit at all.

22 Now, by contrast, Deloitte does not and cannot
23 point to a single internal document, metric, non-senior
24 management individual, or other reasonable audit evidence
25 that provided assurance, let alone the requisite high

1 level of assurance that SCANA's management's assertions to
2 investors were materially correct.

3 So as a result there are only three
4 possibilities, right? Either Deloitte obtained the
5 documents required under PCAOB standards, including the
6 Bechtel Report, and knew that the nuclear project would
7 not be completed on time yet told investors that SCANA's
8 financial statements were in accordance with GAAP when
9 they knew they weren't. Or they didn't follow PCAOB
10 standards and did not obtain the Bechtel Report, the board
11 minutes, the risk committee minutes or the CORB reports,
12 the project metrics, or any other number of standard audit
13 items, yet falsely told investors that they conducted
14 their audits in accordance with PCAOB standards.

15 Or, as we allege, both are true. Deloitte
16 recklessly failed to conduct its audits in accordance with
17 PCAOB standards and knew that SCANA's financial statements
18 were not in accordance with GAAP, yet told investors the
19 exact opposite. Any of those three possibilities is
20 sufficient to demonstrate that Deloitte's statements were
21 false and that it did not believe its audit report
22 statements were true and to defeat the motion to dismiss.

23 In response -- I'm sorry? Okay. Sorry. I
24 thought you said something.

25 (Audio interference.)

1 In response, Deloitte made two, quite frankly,
2 conflicting primary arguments. The first that we heard a
3 little bit today is that Deloitte argues based, as far as
4 I can see, based on pure conjecture and without any
5 citation that the more plausible inference from the facts
6 alleged is that SCANA concealed the truth from Deloitte.
7 First, as this Court is aware, it must accept plaintiff's
8 allegations as true for purposes of the motion to dismiss.
9 There is nothing in the pleadings or even in the public
10 domain to suggest that SCANA concealed the truth from
11 Deloitte as opposed to investors, customers, or
12 regulators. In fact, the available internal SCANA
13 documents make clear that SCANA did not conceal the truth
14 from Deloitte.

15 Second, for that inference to be true, SCANA
16 would have had to refuse to produce to Deloitte the most
17 basic documentation required under PCAOB standards, things
18 like the board minutes, risk committee minutes, regulatory
19 correspondence, and relevant consultant reports like the
20 Bechtel Report. That refusal to cooperate with the audit
21 in and of itself would have required Deloitte to issue a
22 qualified audit report, resign from the engagement, and
23 report SCANA to the SEC, none of which it did.

24 Third, the inference makes no sense. If SCANA
25 had intentionally concealed its fraud from Deloitte, why

1 did Deloitte continue to stay on as SCANA's auditor, even
2 after the Bechtel Report was publicly disclosed?

3 And finally, when a company attempts to conceal
4 fraud from its auditor, it takes specific steps to create
5 fake documents, to damn third parties' lies, et cetera,
6 because auditors have an obligation under PCAOB standards
7 to obtain strong evidence that management's
8 representations are accurate.

9 And a perfect example of this is what the facts
10 were in the Fourth Circuit case that opposing counsel put
11 before you earlier today, Public Employees of Colorado vs.
12 Deloitte. And in that case the company specifically hid
13 side letters and got third parties to sign false audit
14 confirmation letters. Notably, though, even with those
15 active attempts to conceal the fraud from Deloitte,
16 Deloitte was still able to figure out the fraud and it
17 reported it. None of those things occurred here. Not --
18 there was no active attempt to conceal the fraud and there
19 was no identification by Deloitte of the fraud or an
20 attempt to report it.

21 To the contrary actually. While it's been made
22 public that the company hid the Bechtel Report and
23 numerous other documents from investors and regulators, no
24 one in dozens of hearings, depositions, criminal plea
25 agreements, the dozens and dozens of documents that have

1 been made publicly available has anyone ever suggested
2 that those documents were hidden from Deloitte, not even
3 Deloitte until convenient in this litigation.

4 In addition to arguing that the fraud was
5 concealed from it, Deloitte argues, kind of conflictingly,
6 that it actually knew some of the information
7 demonstrating that the nuclear project would not be
8 completed on time, but that plaintiff has no basis for
9 contending that the entirety of the information available
10 to Deloitte was irreconcilable with management's stated
11 view.

12 However, again, the Court must accept
13 plaintiff's well pleaded allegations in the true -- as
14 true. Nowhere in the complaint, or frankly in any of the
15 information Deloitte attached to its motion to dismiss or
16 that has been publicly disclosed, and there is quite a
17 lot, is there any evidence, not one single document or
18 piece of testimony from anyone other than SCANA's former
19 officers, which supports management's stated view that the
20 nuclear project would be completed on time.

21 This, of course, is unsurprising given that even
22 when the project was finally abandoned in July of 2017, it
23 was only 30 percent complete. That's the only reasonable
24 interpretation is that the sum of information known by or
25 required to be reviewed by Deloitte under PCAOB standards

1 was in fact irreconcilable with management's stated view.

2 Recognizing this, Deloitte then resorts to
3 arguing that because there was no restatement it could
4 have not have acted with scienter and its statements were
5 not false. However, the case law is clear that no such
6 restatement is required to hold an auditor liable under
7 Section 10B. We cite a whole bunch of cases on this point
8 in Footnote 43 of our opposition.

9 But I also had my colleague run a quick search
10 this week, since Deloitte had argued this so vociferously
11 in its reply, of cases where (indiscernible) was sustained
12 against an auditor but there was no restatement. And just
13 in a quick search, I think we pulled up 12 or 14 cases
14 where that is, in fact, the case, including one I am
15 currently litigating in the Middle District of Tennessee
16 right now.

17 In addition to the fact that no restatement is
18 required under the law to hold an auditor liable, there
19 are very explicit reasons why no restatement was made
20 here. The first is that in July of 2017, we have SCANA
21 announcing that it had abandoned the nuclear project. So
22 it was clear that the project was not going to be complete
23 in time to obtain the nuclear tax credits. Typically, a
24 restatement is conducted in order to give the information
25 new market and to correct false statements. That

1 information was known at least partially.

2 And then we also have the fact that shortly
3 after they abandoned the nuclear project, they announced
4 that it was going to be -- they were going to be acquired
5 by Dominion. And when that -- when that occurs, a
6 company's investors are no longer relying on the old
7 company's financial statements. And while Deloitte is
8 correct that that merger was not until about a year after
9 the abandonment, SCANA announced the merger in January of
10 2018, and there was no form 10-K issued between the
11 announcement of the abandonment in July of 2017 and the
12 announcement of that merger. So let's walk through now
13 what we know Deloitte was aware of prior to issuing its
14 clean audit reports.

15 We talked a little bit about the fact that they
16 knew about the Bechtel engagement. And the fact that this
17 Court found on Page 9 of its SCANA 1 decision that just
18 the contemplation of hiring Bechtel was sufficient to
19 demonstrate scienter. And then we also have an email,
20 this is an email from September of 2015 from SCANA's
21 comptroller, and he's talking about the fact that Deloitte
22 will be, quote, asking about whether to mention the
23 Bechtel consulting engagement in the next 10-Q. Now,
24 while it's true that this doesn't mean that Bechtel --
25 excuse me, that Deloitte knew about the Bechtel Report, it

1 makes clear that they knew that Bechtel had been hired to
2 consult on the project.

3 Under PCAOB standards, Deloitte is required to
4 understand significant reports from external consultants
5 hired as well as internal reports issued in connection
6 with the project. And we know this not only because of
7 PCAOB standards but because Deloitte itself admitted as
8 much in connection with its Southern Company audit. This
9 is at Paragraph 103 of our complaint where they stated
10 that Deloitte was obligated to collaborate with
11 construction specialists, to assist in its evaluation of
12 processes for ongoing evaluation and monitoring of the
13 construction schedule, and cost forecasts, and to assess
14 the disclosures of core challenges to the achievement of
15 such forecasts.

16 Deloitte ignores this obligation entirely in its
17 briefing. Instead, it tries to claim that its knowledge
18 that SCANA had engaged Bechtel is somehow sufficient in
19 and of itself to have given it comfort that SCANA was
20 acting responsibly and not committing fraud. That's
21 clearly not true.

22 It's required under PCAOB standards to obtain a
23 high level of assurance that the financial statements are
24 materially correct and to determine whether information
25 like the Bechtel engagement conflicted with management's

1 representations regarding the nuclear project. Simply
2 knowing that Bechtel was engaged without finding out what
3 they actually found doesn't even come close to meeting
4 that standard.

5 Then next we have the Bechtel Report itself. If
6 you could turn -- actually we can use defendant's exhibit
7 for this one with Addison's testimony, and I think it's on
8 page -- starts on Page 13 of defendant's slide show. This
9 is the testimony Jimmy Addison gave in connection with the
10 consumer class action brought against SCANA. And to be
11 clear, at no point were plaintiffs trying to hide the full
12 extent of this transcript like opposing counsel was
13 suggesting. We actually give the URL in our complaint.
14 And we're well aware of the incentive testimony. And we
15 think it is very clear that Jimmy Addison is saying that
16 Deloitte knew about the Bechtel Report at the time they
17 were signing off on SCANA's SEC filings.

18 If you look, he testifies on Page 14 of the
19 slide starting at Line 1. He testifies on two separate
20 occasions that Deloitte reviewed the Bechtel Report,
21 quote, at the point in time the SEC filings were made. So
22 that's number one.

23 He also testifies that he was not disturbed by
24 the fact that he did not know about the Bechtel Report
25 when he was signing off on the company's SEC filings,

1 because he knew that Deloitte was vetting the report and
2 that he had a, quote, great deal of confidence that
3 Deloitte thoroughly vetted the issue.

4 How could Addison not be disturbed or have a
5 great deal of confidence that Deloitte had thoroughly
6 vetted the issue at the time he was signing off on the SEC
7 filings if Deloitte hadn't reviewed the Bechtel Report
8 until after the SEC filings were made? That makes no
9 sense.

10 It also makes no sense defendants are trying to
11 argue that, no, they really read the Bechtel Report after
12 it became publicly known and everyone was discussing it.
13 That's when we went back to determine whether everything
14 that had happened before was accurate. But that also
15 makes no sense. Why would Deloitte have been reviewing
16 the Bechtel Report after the fact when the en --
17 basically, the entire State of South Carolina, as far as I
18 could tell, had determined that the Bechtel Report
19 demonstrated that SCANA's representations were false and
20 fraudulent, and said all looks good here. No issues.

21 Defendants claim that Addison testified that
22 Deloitte analyzed the Bechtel Report and SCANA's
23 representations for the purposes of determining whether
24 Deloitte could rely on management's representations after
25 public revelation of the Bechtel Report. But that's

1 actually not true.

2 What he testified to is that the conversations
3 of what Bechtel had previously done had come up during
4 that process. Nor did he testify that he didn't know if
5 Deloitte had reviewed the Bechtel Report before he signed
6 off on the SEC filings as Deloitte claimed.

7 And this is on the very last page of the
8 transcript where they said we ignored what they were
9 referring to. If you look right above the box that they
10 highlighted, he's talking about -- he's being questioned
11 about his conversations with Mr. Byrne. Mr. Byrne was the
12 engage -- audit engagement partner at Deloitte at the
13 time. And the question is, From talking to Mr. Byrne, did
14 Deloitte sign off on the non-disclosure of the Bechtel
15 Reports in the SEC filings at the time the report was
16 issued or only later after abandonment? He says, We did
17 not talk about that specifically. And the question then
18 is, So you don't know the answer to that? And he says,
19 No, I do know the answer to it, referencing the fact that
20 he had testified to just two pages before that he knew
21 they had read it at the time at which they had issued the
22 SEC filings.

23 Now, the point that Deloitte is trying to make
24 in this box here is that he answers he doesn't know when
25 they became aware. Yes, it is likely true that he didn't

1 know the specific date in which he became aware of --
2 which Deloitte became aware of the Bechtel Report. That's
3 different than saying that he didn't know they had
4 reviewed it prior to him signing off on the SEC filings.
5 And in fact he testified earlier that, yes, they did
6 review it at the time they were signing off on the SEC
7 filings.

8 So I think it's abundantly clear from the
9 transcript that Addison is testifying that Deloitte did,
10 in fact, obtain the Bechtel Report. I think that's
11 further supported by the fact that we know Deloitte knew
12 about the Bechtel engagement. And any auditor complying
13 with its obligations would have then had to ask for the
14 report itself.

15 And it is further evidenced by the fact that no
16 one had ever come forward to say Deloitte was unaware of
17 the Bechtel Report outside of this litigation, including
18 Deloitte. And at best, I think it's a question of fact
19 that is sufficient to get over the motion to dismiss at
20 this stage where all inferences have to be taken in favor
21 of the plaintiff.

22 In addition to its knowledge of the Bechtel
23 engagement and the Bechtel reports we have these special
24 audits. Counsel was trying to suggest that their
25 knowledge obtained in these special audits was irrelevant

1 to their clean audit reports because somehow it was in a
2 different context, or related to a different part of the
3 company's finances, or really only had to do with costs.
4 But that's a red herring. The special audits made clear
5 that the nuclear project would not be completed in time.
6 And that information is, by definition, imputed and
7 relevant to their audit opinion on whether the SCANA
8 statements about the nuclear project being completed in
9 time were in accordance with GAAP.

10 We talked already about Carlette Walker and some
11 of the regulatory concerns that they were aware of. In
12 addition to the things we know that they knew about, there
13 were a number of other red flags that were flashing in
14 Deloitte's face that it either ignored or knew about and
15 didn't disclose.

16 And it's not just that Deloitte must have had
17 access to these documents, which is essentially what
18 Deloitte's argument is. It's rather that Deloitte was
19 obligated to review these documents under PCAOB standards.
20 In fact, they were the most basic kind of documents you
21 would obtain in any audit. They're the first things you
22 ask for in conducting an audit. And in fact they're
23 exactly what Deloitte claims it looks at when it is
24 conducting its audit of the Southern Company.

25 And it's, I think, important also to recognize

1 that the nuclear project and obtaining these nuclear tax
2 credits was the entire business of SCANA. The company had
3 bet the family farm on the nuclear project being completed
4 on time to obtain them. So determining whether in fact
5 that could be done and would be done should have been the
6 most important part of Deloitte's SCANA audits.

7 So let's talk about what those documents showed.
8 The board minutes, which we know they're obligated to
9 review under the standards as according to their Southern
10 Company audit and in fact they ignore in their own papers,
11 uniformly make clear that SCANA would not meet the
12 deadline for the credits. They say it repeatedly. It is
13 a constant source of discussion both at SCANA's board
14 itself and at the joint board meetings with Santee Cooper.

15 We have the risk committee meeting -- risk
16 management committee meeting minutes that also say that
17 they were not going to meet the nuclear tax credit
18 deadline.

19 We have the regulatory correspondence where even
20 ORS says we don't think you're going to meet the deadline
21 for the tax credits.

22 We have the CORB reports, which CORB wasn't even
23 put together until far too late in the process. But even
24 once it was put together, it had multiple reports and
25 multiple presentations making clear that the nuclear

1 project would not be completed on time and that SCANA's
2 oversight over the project was insufficient.

3 We have dozens and dozens of regular monthly
4 metrics showing that this project would not be completed
5 on time. In fact, it probably wouldn't have been
6 completed until years after the deadline. And this Court
7 held in SCANA 1 that those specific metrics were
8 specifically evidence of scienter.

9 We have Santee Cooper's regular concerns about
10 the project. Again, SCANA -- Deloitte is obligated to
11 speak with the partner to SCANA on this project to
12 determine whether they have any concerns about the
13 project. Santee Cooper regularly was discussing its
14 concerns with it. And Lonnie Cooper extensively wrote
15 about how the nuclear project was in significant danger.

16 We have employee concerns at SCANA. Ken Browne,
17 who we cited Paragraph 120 of our complaint, who was a
18 former senior engineer with SCANA and was later a
19 whistleblower to the PSC, he testified that there was
20 substantial doubt throughout SCANA regarding whether the
21 nuclear project could be completed on time to receive the
22 tax credits. So we have multiple witnesses at SCANA
23 saying if you had bothered to ask any of us, we would have
24 told you the truth.

25 And then we have, you know, the public

1 statements from Toshiba that PSC rate hikes and a whole
2 host of other evidence demonstrating Deloitte's scienter,
3 including how quickly the project was abandoned after its
4 last clean audit report, the fact that there are ongoing
5 civil and criminal investigations including subpoenas that
6 seek documents pertaining to Deloitte's audits of SCANA,
7 how long and how widespread these PCAOB violations were,
8 and how easy, quite frankly, the GAAP was that was
9 implicated.

10 And then you asked a few questions about motive.
11 Well, I agree that the motive alone here is not sufficient
12 to establish scienter. It's certainly a factor that
13 should be considered in the holistic analysis required
14 under Tellabs. You know, they obtained \$10 million over
15 three years. They were not only retained to do these
16 special audits but had this special additional retention
17 to handle these special audits. And it's clear that there
18 was a huge revolving door between SCANA and Deloitte and
19 that there was an overwhelmingly close relationship
20 between senior management of SCANA and Deloitte.

21 With regard to falsity, I'm not going to get too
22 much into this because Deloitte really didn't address it
23 at all in their reply and I think largely concedes it and
24 didn't really raise it today other than to say, I'm not
25 exactly sure what defense counsel's presentation with

1 regard to the statements today was supposed to show. It
2 is absolutely the case that the specific statements that
3 Deloitte signed off on here and said were in accordance
4 with GAAP were the exact same statements this Court held
5 to be false and misleading in SCANA 1.

6 Now, it is, of course, true that there were
7 numerous other statements alleged to be false in that case
8 that we do not allege. But the ones that we do allege
9 were false and misleading and that Deloitte signed off on
10 as accurate were in fact held by this Court to be false
11 and misleading.

12 With regard to loss causation, I'll address a
13 couple of the arguments that they raise in their papers
14 but didn't arrive -- raise today first.

15 The first was that they can't be held
16 responsible because there was no reference to Deloitte or
17 the audit reports in the corrective disclosures. Under
18 the Fourth Circuit's decision in Katyle and the Supreme
19 Court's decision in Haliburton they need not do so. All
20 that needs to be disclosed is part of the relevant truth.
21 The disclosures need not, quote, precisely identify the
22 misrepresentation or omission.

23 They also argue that there's no reference to the
24 audit reports in the corrective disclosures. Again, in
25 Singer, the Fourth Circuit held that neither a single

1 complete disclosure nor a, quote, fact or fact disclosure
2 to relevant truth is necessary to establish loss
3 causation.

4 They also argue that the risks associated with
5 not meeting the deadline were disclosed to investors. I
6 don't think they argue this very strongly because this
7 Court had already held that those risk disclosures were
8 insufficient and did not reveal the risks to the market.

9 And finally, their primary argument seems to be
10 that the market was fully informed about the fraud on
11 July 27th when SCANA announced that it was abandoning the
12 project and therefore would not meet the deadline for the
13 nuclear tax credits. But plaintiffs allege that there
14 were multiple foreseeable risks that were still hidden by
15 and related to Deloitte's false and misleading clean audit
16 reports that were still concealed after that July 27th
17 date including why, who, and what led to the project being
18 abandoned, the true costs of the project. And that kind
19 of information was disclosed in the news, including the
20 existence of these civil and criminal investigations, the
21 existence of the Bechtel Report, the downgrading of SCANA
22 by rating agencies. All of this information were material
23 omissions of the risk hidden by Deloitte's false and
24 misleading statements. And they don't relate to some
25 other fraud. They clearly relate to the fraud at issue

1 here.

2 Deloitte in their papers relies on three cases
3 to support this argument. They rely on Lattanzio,
4 Amorosa, and Witness, all that aren't in this circuit and,
5 quite frankly, are a little old. But putting that aside,
6 none of those cases support their position. The Fourth
7 Circuit has held, both in Singer and Katyle, that the
8 plaintiff need only allege that the misrepresentation or
9 omission was at least one substantial cause of the
10 investment's decline in value and, quote, need not
11 conclusively show that the securities decline in value is
12 attributed solely to the alleged fraud rather than to
13 other intervening factors. We don't even have that here.
14 This is just fraud.

15 And Katyle also held that no fact or fact
16 disclosure of the relevant truth to the market is a
17 necessary prerequisite to establish a loss causation. And
18 Katyle also said that disclosures need not, quote,
19 precisely identify the misrepresentation or omission in
20 order to be actionable.

21 Lattanzio is an interesting case for Deloitte to
22 cite. In that case, the auditor in that case had warned
23 the market publicly that the company at issue could
24 potentially go bankrupt. It issued what's called a going
25 concern warning. And then plaintiffs alleged that the

1 disclosure of the fraud was the fact that the company
2 announced it was going bankrupt. Obviously, you can't
3 claim that a disclosure of something you already told the
4 market about caused your loss. So the facts are not even
5 remotely similar to those at issue here.

6 And then we have Amorosa. In Amorosa, the
7 plaintiff failed to, quote, mention any audited or annual
8 financial statement. It did not mention even why the
9 auditor there or any other auditor and instead attributed
10 the false statements solely to the company. It failed to
11 allege that the false statements were ever called into
12 question during the stock price declines. It failed to
13 specify what risks were concealed by the audit reports.
14 And it failed to allege any facts that could substantiate
15 the assertion that the auditor's certifications in any way
16 caused its losses. That is completely opposite to what we
17 allege here.

18 And then, finally, in Witness, there were three
19 disclosures. The first disclosure didn't even mention the
20 company's financial statements. The second disclosure
21 related to a period of time prior to the financial
22 statements that were at issue in the case. And the third
23 disclosure was immaterial and contained information,
24 quote, totally unrelated to the financial statements at
25 issue. None of those things are at issue here.

1 And with that I will ask if you have any further
2 questions?

3 **THE COURT:** All right. Thank you very much. I
4 don't think that I have any questions. It seems that the
5 majority of your argument rests on the fact that Deloitte
6 was required to proactively look behind the financial
7 statements or -- and/or -- and not just certify what they
8 saw; is that correct?

9 **MS. POSNER:** That's certainly part of it. The
10 other part is the information that it knew at the time,
11 right? It knew the Bechtel engagement. It knew the
12 Bechtel Report. It knew some of the regulatory concerns.
13 It knew through its special audits that they wouldn't meet
14 the deadlines. So there was certain information that it
15 absolutely, a hundred percent knew.

16 Then there are certain allegations of what they
17 were obligated to review under PCAOB standards. That they
18 couldn't just stick their head in the sand and pretend
19 none of this was occurring. They had to do their job and
20 actually conduct a fulsome vet.

21 **THE COURT:** And the fact that they did not meet
22 the standards you think is sufficient to go forward with a
23 case?

24 **MS. POSNER:** Correct. The courts are uniform,
25 including in the cases cited by the defendants, that if

1 you sufficiently allege facts of PCAOB or GAAS violations,
2 coupled with red flags of fraud, that that is sufficient
3 to establish an auditor's scienter. It is certain that it
4 is tough to do this. But I think in this case we more
5 than sufficiently identified dozens upon dozens of red
6 flags and information known to Deloitte at the time
7 sufficient to establish its scienter.

8 THE COURT: As opposed to negligence?

9 MS. POSNER: Correct.

10 THE COURT: All right. Thank you.

11 Any reply?

12 MR. EDELMAN: Yes, Your Honor. Your Honor, the
13 plaintiffs are just totally mischaracterizing the way the
14 courts apply the scienter standard in cases against
15 auditors. And I would ask that the Court take a look at
16 some of the cases they cite.

17 The Fleming case. In the Fleming case, the
18 auditor was getting a consulting fee at the same time it
19 was collecting audit fees so it was conflicted. And
20 79 percent of the reported earnings of the company was
21 (indiscernible).

22 The MicroStrategy case. The company that the
23 auditors were violating the independence requirement and
24 the magnitude of the errors was extraordinary. And they
25 were allowing revenue recognition based on agreements that

1 they knew were --

2 (Audio interference.)

3 THE COURT REPORTER: I'm sorry. I did not hear
4 the last thing. I think, Ms. Posner, you're not on mute.

5 THE COURT: Is Ms. Posner on mute, or --

6 THE COURT REPORTER: She is now.

7 THE COURT: Okay. Yes?

8 MR. EDELMAN: The New Mexico state case. Option
9 grants were made with no documentation. A billion dollars
10 in option awards were made without documentation. And
11 then Ernst and Young in that case became involved in the
12 issue, and they didn't correct it for another one or two
13 years.

14 The Suprema case, that's a case where the
15 company had phony sales of cheese that were accounting for
16 two thirds of its revenue. And their 10-K didn't say that
17 they were in the cheese business.

18 These are cases where there are outrageous
19 allegations. In our case, let me be clear, Deloitte
20 scrupulously complied with its obligations under GAAS and
21 GAAP. And if we need to defend this case, which we
22 shouldn't, that would come out.

23 There are no allegations -- you know, any
24 plaintiff can come forward and say they violated GAAP,
25 they violated GAAS. That's not what -- that's not

1 sufficient. They need to have specific allegations.

2 What we know here and what makes this case so
3 ripe for dismissal is that the organization that was
4 directly responsible for auditing this project, we were
5 responsible for auditing the financial statement. But the
6 South Carolina regulators, the PSC, they were responsible
7 for auditing the project. And they, like we, were aware
8 that there were a series of cost overruns and a series of
9 schedule delays.

10 The plaintiffs -- and they made the
11 conclusion -- by the way, they have an audit arm. They
12 took 4,000 pages of testimony. They did a serious
13 investigation. And they felt comfortable time after time
14 with new schedules that were delayed. What plaintiffs are
15 doing here is they're saying, well, Deloitte had documents
16 that told them that there were cost overruns and
17 scheduling delays but that's also true of the regulators.
18 Everybody knew there were cost overruns and schedule
19 delays.

20 Now, what would be different, Your Honor, is if
21 plaintiff had come forward with allegations -- with well
22 pleaded allegations that Deloitte had a copy of the
23 Bechtel Report. And in fact, Ms. Posner said at one point
24 of her argument, she said until it became clear that
25 Deloitte had the information in the Bechtel Report,

1 plaintiffs were unlikely to survive a motion to dismiss.
2 Well, she should be right. She should be right that if
3 this Court looks at the Addison testimony, which we'll
4 walk through in a moment, and concludes as I think any
5 fair reading of the testimony bears out, that this
6 testimony does not support that Deloitte had a copy of the
7 Addison report. Then the other stuff, yes, Ms. Posner is
8 right. They should not survive a motion to dismiss unless
9 you read that to say that we had the Bechtel Report.

10 Now, I'd like to just go through the testimony.
11 Because I was trying -- I couldn't believe the way that
12 this language was being read and interpreted. It's
13 just -- it's not a fair reading.

14 So, first of all -- and you start on Page 96.
15 It says, You were signing your company's SEC filings
16 during the time? And he says, Yes. And then the question
17 is, It doesn't disturb you at all that the company spent
18 seven figures on an assessment in 2015 regarding the
19 status -- regarding the project and you weren't made aware
20 of the results of that assessment while you were
21 certifying these SEC filings? The answer is, It does not,
22 and part of that conclusion is we've got an international
23 accounting firm that's auditing our records, that's gone
24 back and looked at it completely and said they did not see
25 any gaps in our disclosure.

1 The next red box. How do you know that? They
2 told me that. Question, When? I don't know specifically
3 when, sometime obviously post-abandonment. So there we
4 have it again. This conversation happened after the
5 abandonment.

6 Next red box. What did they tell you about it?
7 That they had gone back with their local team and their
8 national team and reviewed all the disclosures at the
9 point in time they were made. So they had gone back and
10 reviewed the disclosures when they were made, and read the
11 document, and they didn't see any gaps in the disclosure
12 at the time they were made.

13 And here's something interesting. And who from
14 Deloitte told you that? The partner at Deloitte now, Sean
15 Bird.

16 Well, Your Honor, Sean Bird was not the audit
17 partner who was on the account at the time that these
18 audits were done. The testimony says, Who told you that?
19 This conversation is coming from the audit partner who is
20 in charge of it now, Sean Bird. It's a conversation
21 looking at it historically. There's nothing to indicate
22 in any of this that Bechtel had the information at the
23 time.

24 And then on the next page, I mean, if there were
25 any doubt, again, I'm sorry, I didn't understand

1 Ms. Posner's interpretation of this last block. Okay. So
2 do you now know whether Deloitte -- when Deloitte became
3 aware of the results of the Bechtel assessment? I do not
4 know the answer to that.

5 Now, we also know -- we also know that they
6 have -- the plaintiffs have taken the position, and there
7 are newspaper articles that allege that SCANA was lying to
8 everybody and SCANA was trying to hide the Bechtel Report
9 in the attorney/client privilege. Plaintiffs themselves,
10 Your Honor, allege in Paragraph 365 in the last sentence
11 that if Deloitte had been given a copy of this Bechtel
12 Report, that would have destroyed the attorney/client
13 privilege. So according to plaintiff's own complaint, it
14 would have destroyed their fraud if they had provided a
15 copy of this Bechtel Report. So therefore --

16 Look, the linchpin of Your Honor's decision in
17 the earlier case was the knowledge of the Bechtel Report.
18 They conceded on Page 50 of their brief. They've repeated
19 the concession in the oral argument today. And you can't
20 read this testimony to say that Bechtel had the report.

21 Your Honor, this was not the motion for us to
22 contest that we complied with GAAP and GAAS. Those are
23 factual issues. We did our job here. And the fact that,
24 yes, we saw documents just like the regulators saw
25 documents that said there were schedule delays and cost

1 overruns. But they concluded, the regulator who was
2 looking at this, that with -- that those could be cured
3 with additional delays in the schedule and with the fixed
4 cost contract with Westinghouse.

5 This case is completely different than Fleming,
6 MicroStrategy, New Mexico State, and Suprema. This is not
7 a case where plaintiffs have come forward with facts that
8 establish that we were reckless or knowing. On that
9 basis, we ask that you dismiss the case.

10 **THE COURT:** All right. Thank you.

11 Is there anything else?

12 **MS. POSNER:** Just one point, Your Honor, if I
13 might? I'll be quite quick. Opposing counsel started off
14 his rebuttal by discussing what the standard is for
15 holding an auditor liable. And I thought it would be
16 helpful to just quote a few of the holdings from the cases
17 it cites in support of its motion.

18 In Iowa Public Employees vs. Deloitte-Touche,
19 this is a Southern District of New York case from 2013
20 that they cite at thirty -- Page 36 of their motion and 11
21 of their reply. The Court holds that while blanket
22 assertions of GAAP or GAAS violations will not alone
23 suffice to state a claim of securities fraud, such claims
24 together with various red flags are sufficient to support
25 a strong inference of scienter.

1 Similarly, in In re DNTW, this is cited in their
2 motion at Page 34, the Court found that there was, quote,
3 no audit at all because the plaintiff, quote, alleges that
4 the auditor disregarded specific red flags that would
5 place a reasonable auditor on notice that the audited
6 company was engaging in wrongdoing to the detriment of its
7 investors.

8 Then we have In re SCB. The Court held that
9 when plaintiffs are able to identify specific, highly
10 suspicious facts and circumstances of which the auditor
11 was aware at the time of the audit, and the complaint
12 alleges that those facts were deliberately or recklessly
13 ignored, GAAP -- however GAAP and GAAS violations are
14 relevant to show an auditor's scienter.

15 So the case law is clear, including on the cases
16 cited by defendants, that red flags coupled with PCAOB and
17 GAAS violations are sufficient to establish scienter. I
18 think we've pled more than sufficient evidence of those
19 flashing red flags here as well as Deloitte's specific
20 knowledge of things like the Bechtel Report and engagement
21 that demonstrate its knowledge of the fraud.

22 **THE COURT:** All right. Thank you. Well, I
23 appreciate everybody's arguments today. And the briefs
24 were very helpful, and very informative, and very well
25 done.

1 The case arises out of the abandonment of the
2 nuclear project at the VC Summer nuclear facility in
3 Fairfield County, South Carolina. And in the consolidated
4 complaint, the plaintiffs allege that Deloitte violated
5 its professional responsibilities, failed in its role of
6 gatekeeper, and deceived investors about SCANA's
7 accounting for and expected completion of the project.
8 The plaintiffs allege that Deloitte employed devices,
9 schemes, and artifices to defraud, made untrue statements
10 of material facts, or omitted to state material facts
11 necessary in order to make the statements made, in light
12 of the circumstances under which they were made not
13 misleading, or engaged in acts, practices, and a course of
14 business that operates as a fraud or deceit upon plaintiff
15 and others similarly situated in connection with their
16 purchases of SCANA securities during the class -- during
17 this period.

18 Deloitte has moved to dismiss the complaint
19 generally on the ground that SCANA's deception as to the
20 status of the project are not imputable to Deloitte. And
21 Deloitte argues that it was engaged only to conduct
22 financial audits of SCANA's financial statements and to
23 review project costs with respect to the special audits to
24 ensure that SCANA's filings complied with generally
25 accepted accounting practices.

1 This motion is brought pursuant to Rule 8, 9(b),
2 and 12(b)(6) of the Federal Rules of Civil Procedure and
3 the Private Securities Litigation Reform Act of 1995. The
4 purpose of the Rule 12(b)(6) motion is to test the
5 sufficiency of the complaint and not to resolve contests
6 surrounding the facts, the merits of a claim, or the
7 applicability of defenses. A complaint must contain
8 sufficient factual matter accepted as true to state a
9 claim to relief that is plausible on its face.

10 To show securities fraud under 10(b) of the
11 Exchange Act, a plaintiff must plead a material
12 misrepresentation or omission, scienter, a connection with
13 the purchase or sale of a security, reliance, economic
14 loss, and loss causation. Both Rule 9 of the Federal
15 Rules of Civil Procedure and the heightened pleading
16 standards for securities actions require the plaintiff to
17 state its allegations with particularity.

18 Deloitte asserts that the complaint does not
19 plausibly allege that it has contemporaneous knowledge of
20 the Bechtel Report. Deloitte contends that false and
21 misleading statements and omissions arising out of SCANA's
22 2015 and 2016 10-Ks were not made or audited by Deloitte
23 and that plaintiffs cannot rely on the alleged
24 misstatements or omissions of SCANA to assert a claim
25 against Deloitte.

1 Deloitte argues that plaintiffs fail to allege
2 that opinions issued by Deloitte contained embedded
3 misstatements of fact. And even if such allegations were
4 made, Deloitte cannot be held liable because it merely
5 issued opinions regarding SCANA's financial statements.

6 Deloitte also contends that plaintiffs failed to
7 sufficiently allege with particularity that Deloitte --
8 that their audits or their audit opinions omitted material
9 facts. According to Deloitte, the only omissions alleged
10 in the complaint are either contained in SCANA's
11 statements and not Deloitte's opinions. Or they otherwise
12 related to unaudited quarterly statements that are
13 irrelevant to any potential actionable statements made by
14 Deloitte.

15 Deloitte also asserts that plaintiffs failed to
16 allege a strong inference of scienter. And Deloitte
17 states that it had no reason to disbelieve the information
18 SCANA was presenting to its regulators. Deloitte argues
19 that the failure to plead motive supports a lack of
20 scienter. And defendant Deloitte contends that the
21 plaintiffs only allege that Deloitte was motivated to
22 issue fraudulent opinions with the intent to defraud
23 because it had a long relationship with SCANA and because
24 of the amount that was paid for its audit work. And
25 Deloitte rejects this inference because, like other

1 accountants, its success depends on maintaining a
2 reputation for honesty and integrity.

3 And finally, Deloitte contends the complaint is
4 barred by the two-year statute of limitations.

5 The Court has reviewed the allegations of the
6 consolidated complaint. And the Court finds that the
7 plaintiffs have stated a claim for relief even under the
8 heightened standards applicable in this case. The
9 plaintiffs assert that Deloitte gave unqualified, clean
10 audit reports on SCANA's financial statements and internal
11 control over financial reporting misleading investors into
12 believing that SCANA would complete the project in time to
13 obtain a 1.4 million -- \$1.4 billion in nuclear tax
14 credits.

15 The plaintiffs allege that as SCANA's external
16 auditor for over 70 years, Deloitte was responsible for
17 understanding SCANA's business, identifying and responding
18 to risk of material misstatements, and obtaining
19 sufficient appropriate audit evidence in response to such
20 risks so that it could provide a high level of assurance
21 that SCANA's financial statements were in accordance with
22 generally accepted accounting principals.

23 According to the plaintiffs, Deloitte was
24 required to review and test historical day-to-day
25 performance in connection with its audits and should have

1 been aware of internal memoranda, the Bechtel materials,
2 monthly reports, and other information showing that
3 regulatory and financial support for the project were in
4 jeopardy.

5 Plaintiff's state that, nevertheless, Deloitte
6 told investors that SCANA's financial statements
7 confirming that the project was on schedule were presented
8 fairly in all material respects and in accordance with
9 generally accepted accounting principals, that SCANA's
10 related internal control over financial reporting was
11 effective, and that of the total estimated gross
12 construction costs of \$7.6 billion, SCANA's investment
13 totaled 3.6 billion for which the financing costs of
14 3.2 billion have been reflected in rates under the BLRA.

15 The plaintiffs recount in their complaint the
16 numerous memoranda, monthly progress reports, and
17 presentations that contradicted assertions made by SCANA
18 to the PSC and state that Deloitte, nevertheless,
19 permitted SCANA to represent in its quarterly interim
20 financial statements on forms 10-Q that the project would
21 be placed into service prior to 2021, and that the
22 estimated total gross construction costs were no more than
23 \$7.7 billion.

24 The plaintiff lists numerous ways in which they
25 contend Deloitte disregarded obligations recognized by the

1 Public Company Accounting Oversight Board, which is
2 responsible for establishing professional audit standards
3 applicable to audits of publicly-traded companies
4 including SCANA. These include planning and performing
5 audit procedures sufficient to obtain reasonable assurance
6 about whether SCANA's 2015 and 2016 financial statements
7 were free of material misrepresentation or free of
8 material misstatements whether caused by error or fraud.

9 The plaintiffs allege Deloitte was required
10 under PCAOB standards to review the metrics schedules,
11 Bechtel Reports and findings, and other communications
12 demonstrating that the project continued to suffer from
13 significant and material delays and would be unable to
14 meet the necessary deadline to receive tax credits.

15 Plaintiffs allege that Deloitte helped conceal
16 the fraud from investors by blessing the form 10-K
17 financial statements which represented that the unit would
18 be operational and qualify for the nuclear production tax
19 credits. Plaintiffs allege that both SCANA and Deloitte
20 continued to reassure investors that the project would be
21 completed in time, even though they knew this information
22 was false.

23 Regarding scienter, plaintiffs allege Deloitte
24 was responsible for understanding significant reports from
25 external consultants, such as Bechtel, as well as internal

1 reports issued in connection with the project. And the
2 plaintiffs have alleged that Deloitte was required to
3 determine whether Bechtel's findings conflicted with
4 SCANA's representations regarding the project, especially
5 given the importance of the project to SCANA and the
6 materiality of the Bechtel's engagement itself.
7 Plaintiffs contend Deloitte's failure to do so amounts to
8 basically no audit at all.

9 And plaintiff's also allege Deloitte was
10 required to understand SCANA's business and identify and
11 respond to risk of material misstatements affecting
12 SCANA's financial statements. Plaintiffs contend that
13 Deloitte failed to properly assess the risk that a
14 material weakness existed in SCANA's internal controls
15 over financial reporting.

16 The plaintiffs also allege that Deloitte was
17 required to determine whether statements made to the PSC
18 were accurate and indeed had ample evidence that SCANA's
19 representations to the PSC were false. Plaintiff also
20 notes that the rate hikes were allowed because of the lack
21 of transparency and forthrightness with regard to the
22 studies available to SCANA. And the plaintiffs allege
23 that Deloitte should have tested the effectiveness of
24 internal controls over the ongoing evaluation and
25 monitoring of the construction schedule and cost forecasts

1 for the project.

2 The plaintiffs assert that Deloitte could not
3 have believed its representations given the Bechtel
4 Reports, monthly progress reports, and other internal
5 correspondence that describe deficiencies in the progress
6 of the project. They also allege that loss causation
7 based on Deloitte's alleged misconduct, including its
8 issuance of clean audit reports, concealed and
9 dramatically understated foreseeable risks that SCANA
10 would not complete the project in time.

11 Plaintiffs allege that the disclosure in the
12 financial statements failed to reveal the extent of the
13 risk related to the nuclear project and the SCANA's common
14 stock loss value when the conceal risks were revealed.
15 Plaintiffs allege that SCANA's financial statements hid
16 the true status of the project which Deloitte was aware
17 of.

18 Finally, with regard to the limitations period,
19 plaintiff's claim that they did not discover Deloitte's
20 purported scienter until Deloitte's knowledge of the
21 Bechtel Report became publically known in October of 2018.
22 Based on the facts in the record and the allegations in
23 the record, plaintiff's consolidated complaint adequately
24 sets forth a plausible claim for relief under applicable
25 rules of civil procedure and securities laws. Based on

1 that, Deloitte's motion to dismiss is denied.

2 Is there anything further that we need to
3 discuss?

4 MS. POSNER: Not at this time, Your Honor.

5 THE COURT: All right. Thank you very much. I
6 appreciate it.

7 MS. POSNER: Thank you.

8 (WHEREUPON, court was adjourned at 4:21 p.m.)

9 * * *

10 I certify that the foregoing is a correct transcript to
11 the best of my ability from the record of proceedings in
12 the above-entitled matter.

13 s/Karen E. Martin

11/24/2020

14 _____
Karen E. Martin, RMR, CRR

Date _____

<p>MR. EDELMAN: [11] 4/10 5/11 5/13 6/10 10/14 32/21 33/8 35/4 36/13 68/11 69/7</p> <p>MR. OGIBA: [1] 4/8</p> <p>MR. TINKLER: [1] 4/1</p> <p>MR. TOLL: [1] 4/3</p> <p>MS. MOSS: [2] 4/12 4/16</p> <p>MS. POSNER: [13] 3/3 3/15 37/20 40/4 40/6 41/22 42/3 67/8 67/23 68/8 74/11 84/3 84/6</p> <p>THE COURT REPORTER: [5] 3/12 3/19 5/3 69/2 69/5</p> <p>THE COURT: [31] 3/2 3/4 3/23 4/5 4/7 4/14 4/19 4/22 5/5 5/9 5/12 6/9 10/13 32/13 33/2 34/15 36/4 37/16 40/2 40/5 41/21 41/23 67/2 67/20 68/7 68/9 69/4 69/6 74/9 75/21 84/4</p>	<p>2015 [11] 21/18 21/25 22/2 25/4 25/6 25/21 27/24 53/20 71/18 77/22 81/6</p> <p>2016 [10] 10/7 25/23 26/8 26/10 26/15 43/4 43/7 43/8 77/22 81/6</p> <p>2017 [8] 10/8 25/7 31/4 31/7 32/10 51/22 52/20 53/11</p> <p>2018 [4] 17/23 18/12 53/10 83/21</p> <p>2019 [1] 25/4</p> <p>2020 [6] 1/4 3/1 25/4 25/8 25/8 84/13</p> <p>2021 [1] 80/21</p> <p>21st [1] 21/25</p> <p>27 [1] 31/7</p> <p>27th [4] 31/3 32/9 64/11 64/16</p> <p>29401 [2] 1/14 1/25</p> <p>29402 [1] 2/5</p> <p>2:09 [1] 3/2</p> <p>2nd [1] 4/24</p>	<p>84/11</p> <p>able [15] 30/18 31/5 34/20 35/16 36/17 38/10 41/6 41/20 41/25 42/1 42/16 42/19 47/2 50/16 75/9</p> <p>about [71] 5/16 7/6 8/22 9/4 9/8 9/24 9/24 10/17 11/13 11/22 12/1 12/9 12/18 15/13 16/1 20/18 23/8 23/8 23/18 23/19 24/6 24/12 24/13 25/24 26/14 26/25 27/5 28/5 28/9 28/10 28/11 28/14 28/16 30/11 30/12 30/19 30/22 37/13 40/18 41/10 42/22 42/22 43/2 43/2 43/20 53/8 53/15 53/16 53/21 53/22 53/25 55/16 55/24 57/10 57/11 57/17 58/12 59/8 59/10 59/12 59/14 60/7 61/9 61/12 61/15 62/10 64/10 66/4 72/6 76/6 81/6</p> <p>above [2] 57/9 84/12</p> <p>above-entitled [1] 84/12</p> <p>absolutely [6] 25/16 32/25 42/9 42/14 63/2 67/15</p> <p>abundantly [2] 41/19 58/8</p> <p>accept [2] 49/7 51/12</p> <p>accepted [5] 34/8 76/25 77/8 79/22 80/9</p> <p>accepting [1] 15/18</p> <p>access [1] 59/17</p> <p>accordance [12] 33/4 35/2 38/9 46/9 48/8 48/14 48/16 48/18 59/9 63/3 79/21 80/8</p> <p>according [4] 60/9 73/13 78/9 79/23</p> <p>account [1] 72/17</p> <p>accountants [1] 79/1</p> <p>accounting [11] 15/25 34/9 38/13 45/11 69/15 71/23 76/7 76/25 79/22 80/9 81/1</p> <p>accurate [6] 24/15 41/16 50/8 56/14 63/10 82/18</p> <p>accurately [2] 25/11 25/11</p> <p>achievable [1] 15/24</p> <p>achievement [1] 54/14</p> <p>acquired [1] 53/4</p> <p>act [3] 13/19 77/3 77/11</p> <p>acted [2] 13/21 52/4</p> <p>acting [1] 54/20</p> <p>action [6] 3/7 6/23 7/15 8/19 38/25 55/10</p> <p>actionable [3] 30/14 65/20 78/13</p> <p>actions [1] 77/16</p> <p>active [3] 15/2 50/15 50/18</p> <p>acts [1] 76/13</p> <p>actual [1] 9/25</p> <p>actually [18] 14/12 15/4 18/6 21/10 22/7 23/11 27/18 28/4 35/25 39/13 46/19 50/21 51/6 55/3 55/6 55/13 57/1 67/20</p> <p>add [1] 37/3</p> <p>Addison [13] 19/24 20/24 21/8 22/21 28/10 43/10 55/9 55/15 56/4 56/21 58/9 71/3 71/7</p> <p>Addison's [2] 20/3 55/7</p> <p>addition [9] 40/17 41/8 42/21 44/2 46/6 51/4 52/17 58/22 59/12</p> <p>additional [6] 24/4 25/17 31/13 42/11 62/16 74/3</p> <p>address [12] 17/12 21/8 29/4 29/5 30/6 36/13 37/22 37/23 39/5 42/24 62/22 63/12</p>
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